



516 SE Morrison Street  
Portland, OR 97214

T 503.242.1745  
F 503.242.1072

HOBBSSTRAUS.COM

## MEMORANDUM

August 27, 2018

To: Tribal Housing Clients

From: Hobbs, Straus, Dean & Walker, LLP

Subject: ***HUD Consultation on Draft Environmental Review Regulations***

---

On August 8, 2018, the U.S. Department of Housing and Urban Development (HUD) sent out a “Dear Tribal Leader” letter inviting Tribes to engage in government-to-government consultation during the re-drafting of its environmental regulations that affect HUD’s Indian Programs. With this letter, HUD has drafted a Proposed Rule, which makes changes to streamline the regulations at 24 CFR Parts 50, 51, 55, and 58. These documents are being forwarded along with this memo.

HUD’s Office of Environment and Energy (OEE) is leading this effort to streamline environmental review regulations. HUD began this process with its “Dear Tribal Leader” letter, dated May 16, 2018, which initiated tribal consultation on HUD’s re-drafting of its environmental review regulations. In that letter, a comment period and a webinar and conference call was announced. After that letter, HUD considered the comments and incorporated them to the extent possible in a draft rule. Many of the recommendations received either would not require regulatory action or are not within HUD’s authority to change, so the Department is considering publishing new guidance or engaging in interagency collaboration to address those recommendations. HUD has said it will post the comments and HUD’s responses soon.

With the August 8, 2018 letter, HUD invites tribal leaders to participate in a 60-day comment period. This comment period is prior to, and in addition to, the standard public comment periods associated with publishing rules in the Federal Register. During this comment period, HUD is hosting webinars and conference calls on September 5 and September 26, at 2 p.m. EDT.

### **Summary of Proposed Changes**

The regulations at issue outline the relationship between HUD environmental review requirements and other federal laws, including the National Environmental Policy Act (NEPA) or the National Historic Preservation Act (NHPA). The majority of the changes are to 24 CFR Part 50, which applies to general environmental review, and 24 CFR Part 58, which outlines the process for an Environmental Impact Statement (EIS).

HUD has developed a summary of its proposed changes as it seeks to achieve the federal priority of streamlining or eliminating duplicative or burdensome regulations. We have provided additional details regarding the Proposed Rule.

#### Adoption of Existing Environmental Reviews

In order to reduce repetitive and duplicative environmental reviews (ERs), HUD has proposed adding new sections in Parts 50 and 58 that would encourage HUD and responsible entities (REs) to adopt existing ERs where another RE or federal agency has already prepared an ER for the same project. This would include the addition of new sections: § 50.BB and § 58.BB.

In the Proposed Rule, HUD would independently review the environmental review to ensure it is adequate. HUD then envisions an adoption taking the form of a short memo signed by the approving official or certifying officer certifying that HUD or the RE has taken all of the steps required by these sections. “OEE is seeking feedback on: (1) whether the requirements in these sections are appropriate and (2) any potential scenarios that are not adequately addressed by these sections.”

#### Updating Completed Environmental Reviews

New sections in Parts 50 and 58 clarify how Environmental Review Records (ERRs) should reflect supplemental assistance (e.g. a new funding source added to a project with a completed ERR), when reevaluation is appropriate, and when ERRs should be updated to reflect changes in conditions or proposals without triggering reevaluation. In both Parts, these sections were moved so that they apply to all levels of review.

The sections are added as § 50.AA and § 58.AA. The language is similar in the sections. In Part 50, this section requires HUD to assume responsibility for completing one Part 50 review to avoid the need for an additional Part 58 review whenever possible.

The Part 58 requirements differ from Part 50 in a key way. If a new funding source is added to a proposal with a completed Part 58 review, but the new program would normally require a review from HUD or a different RE, the original RE cannot simply update the existing ERR to reflect the new program. To avoid duplication, HUD/the new RE should adopt the existing ERR. There might also be situations where adoption or an update is insufficient. The Proposed Rule outlines that process.

#### Changes to Categorical Exclusions under NEPA

A Categorical Exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (Sec. 1507.3) and for which, therefore, neither an

environmental assessment nor an environmental impact statement is required . . . 40 CFR 1508.4.

HUD is proposing to expand its categorical exclusions in both Parts 50 and 58. These sections contain a great deal of changes, as HUD “seeks to require fewer EAs for rehabilitation and small construction projects.” In the regulations, in Part 50, there are two types of categorical exclusions – ones that are not subject to other federal laws and authorities (§ 50.19); and those that are (§50.20). Further, Categorical Exclusions are also listed in Part 58 at §58.35.

Some examples of categories added to categorical exclusions in § 50.19 are archaeological surveys for cultural resources, and tenant-based leasing. There is also a change to the definition of § 50.19(15) Activities to assist homebuyers to purchase existing dwelling units or dwelling units under construction to define it as “meaning the foundation is already in place at the time of the environmental review.” Further for categorical exclusions in § 50.20, HUD proposed to add or change several categories related to housing units.

In addition, the regulations already required that for categorical exclusions having the potential for significant impact because of extraordinary circumstances, HUD must prepare an EA or an EIS. HUD proposes to define “extraordinary circumstances.”

#### Changes to Historic Property

In addition to categorical exclusions, OEE is also proposing a new exclusions for certain activities from Section 106 of the NHPA. The Proposed Rule would add § 50.4(5), under related federal laws and authorities, which declares that certain activities have no potential to cause effects to historic properties and no further review under Section 106 is required. This includes Rehabilitation or renovation of an existing building or property in residential use that was built within the previous 45 years where certain conditions apply and other activities HUD designates through memorandum.

HUD lists this item as a minor change, for projects without potential to cause effects to historic properties.

#### Choice Limiting Actions

The Proposed Rule would add a definition for “choice limiting actions” in Parts 50 and 58 as follows:

§50.2(a) and §58.2(a)(3): Choice limiting action means an action that may have an adverse impact on the environment or limit the choice of reasonable alternatives. A choice limiting action may include, but is not limited to, real property acquisition, demolition, disposition, rehabilitation, repair, new

construction, site preparation or clearance, lead abatement, asbestos abatement, ground disturbance, and leasing. Activities listed in section 58.35(b) of this part and site studies and assessments that will not have an environmental impact, including Phase I and Phase II Environmental Site Assessments, minimal associated soil boring, and wetlands delineations, are not choice limiting actions.”

In Part 50, the definition also includes “Conditional contracts and options to acquire real property are not choice limiting if they are properly conditioned on completion of a satisfactory environmental review.” The term is then used in §50.17 as a decision point for the project. “Specifically, no action concerning the proposal shall be taken prior to completion of the environmental review which could have an adverse environmental impact, prejudice the ultimate decision of the proposal, or constitute a choice limiting action.” It is also used in §58.22, which limits activities pending clearance.

HUD says these proposed revisions to Part 50 would modernize section 50.17 by eliminating outdated references and codifying requirements.

#### Changes to the EIS Process

In Part 55, Subpart G, the Proposed Rule has a note that says “OEE intends to update the procedures below to reflect current procedural requirements for EISs. These changes will be designed with the help of OGC.”

Tribal leadership should consider the importance of this section. This might be a good place to ask questions during the webinar.

#### Changes to Normally unacceptable noise zone

In Part 51, HUD has proposed changes to the rule regarding unacceptable noise zones. The Proposed Rule removes the requirement for a Special Environmental Clearance, and sets out the process for an EIS.

#### Publishing notices online

In the Proposed Rule, HUD is proposing to allow responsible entities to publish public notices on the jurisdiction’s official government website in lieu of a newspaper. This is proposed in Part 55 for floodplain management and Part 58 for EISs. The Proposed Rule also removes the requirement for mailing. It will be important to consider if these changes will either help or hurt your members’ ability to get information needed on a project.

HUD also proposes administrative and minor changes

Finally, HUD is considering various minor clarifications and updates to the related federal environmental laws and authorities, including:

- Excepting Disaster recovery projects from Part 51 Subpart D - Airport Hazards and updating terminology throughout the Subpart
- Permitting projects processed under Part 58 to rely on private flood insurance meeting NFIP minimum requirements

HUD is proposing to codify and clarify existing requirements in a number of areas, including:

- Updating Part 58 to reflect current procedural requirements for Environmental Impact Statements
- Codifying analytical requirements for EAs in Part 50
- Clarifying timelines for tiered reviews in Part 58
- Defining who may act as a Certifying Officer in Part 58

**Conclusion**

HUD is currently accepting comments from tribal leaders on the proposed rules for 60 days, which is Friday, October 5, 2018. There will also be a posting in the Federal Register and an additional comment period. If you have any questions for HUD, you can contact Marcel Tchaou in HUD's Office of Environment and Energy at [EnvironmentalPlanningDivision@hud.gov](mailto:EnvironmentalPlanningDivision@hud.gov) or 202.402.5226.

You may send comments, edits, and suggestions to:

Marcel Tchaou  
Director, Environmental Planning Division  
HUD Office of Environment and Energy  
451 7<sup>th</sup> Street SW, Room 7212  
Washington, DC 20410.  
[EnvironmentalPlanningDivision@hud.gov](mailto:EnvironmentalPlanningDivision@hud.gov)

There will be two webinars to learn more and provide comments on September 5 and September 26 at 2 pm EDT. You can join the meeting via Skype (information will be posted on <https://www.hud.gov/codetalk>) or by calling the following number:

Audio: 888.675.2535 Access Code: 4038003#

Please let us know if you have any questions about this memorandum. We are available to assist with the development of comments or questions for the webinar, or the submission of comments to HUD regarding the Proposed Rule. Please do not hesitate to contact me at [goodman@hobbsstrauss.com](mailto:goodman@hobbsstrauss.com) or by phone at (503) 242-1745.